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May 7, 2009

BY HAND DELIVERY

Anne K. Quinlan
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: Docket No. AB 167 (Sub-No. 1189X)
Consolidated Rail Corporation—Abandonment
Exemption—in Hudson County, New Jersey

Docket No. AB 55 (Sub-No. 686X) 225072
CSX Transportation, Inc.—Discontinuance
Exemption—in Hudson County, New Jersey

Docket No. AB 290 (Sub-No. 306X) 225073
Norfolk Southern Railway Company—
Discontinuance Exemption—in Hudson
County, New Jersey

Dear Secretary Quinlan:

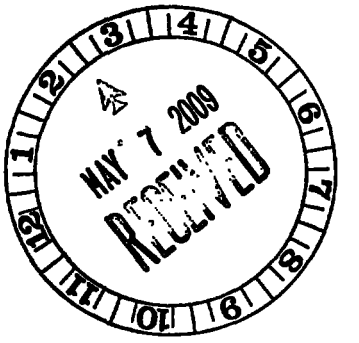
Enclosed for filing with the Board are the original and ten copies of "Comments of Consolidated Rail Corporation on Environmental Assessment." Please date-stamp the enclosed extra copy and return it to our representative.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB NO. AB 167 (SUB-NO. 1189X)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

STB NO. AB 55 (SUB-NO. 686X)

CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

STB NO AB 290 (SUB-NO. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

COMMENTS OF CONSOLIDATED RAIL CORPORATION ON ENVIRONMENTAL ASSESSMENT

On March 23, 2009, the Board's Section of Environmental Analysis ("SEA") issued its Environmental Assessment ("EA") in these abandonment exemption proceedings. On April 6, the Office of Proceedings issued a decision setting May 7 as the due date for comments on the EA. On April 16, Chairman Mulvey issued a decision confirming the May 7 due date for comments on the EA and staying the effective date of the exemption until the environmental process is complete. Pursuant to those decisions, Consolidated Rail Corporation ("Conrail") submits its comments here on the EA and on the environmental process.

Background

These abandonment and discontinuance proceedings effectively began over three years ago, when in January 2006 the City of Jersey City and others (the "City Parties") sought a declaration that part of a dismantled right-of-way called the "Harsimus Branch" was a "line of railroad" requiring abandonment authority from the Board. Conrail and the current owners (the "LLCs") of the "Embankment" properties involved in the case opposed the City Parties' request. After extensive evidentiary proceedings, the Board in August 2007 held that abandonment authority was required. *City of Jersey City, Et Al.—Pet. for Dec. Order,* STB Fin. Dkt. No. 34818 (served Aug. 9, 2007) ("*City of Jersey City*"). In December 2007, the Board denied a petition for reconsideration by the LLCs.

Conrail thereupon began preparations to seek abandonment authority for the Harsimus Branch right-of-way. There had been no traffic on the line for almost two decades and no rail infrastructure remained. Accordingly, the line qualified for the exemption procedures of 49 C.F.R. § 1152.50. In February and March 2008, Conrail initiated consultations with all appropriate federal, state, and local entities and served the Environmental and Historic Report ("E&H Report") required by 49 C.F.R. §§ 1105.7 and 1105.8—with the intent of filing Notices of Exemption in April 2008. Both the consultations and the E&H Report itself generated comments from several parties about potential indirect effects of the abandonment. In particular, some parties contended that the E&H Report should address the indirect environmental and historic preservation effects of potential reuse of the Embankment properties.

Conrail delayed filing the Notices of Exemption in order to address the concerns that had been raised. Because of the emphasis other parties had placed on historic preservation issues,

Conrail hired Richard Grubb and Associates ("RGA"), a consulting firm that specializes in historic preservation analysis, to provide more information regarding the historic preservation concerns that had been raised. Although RGA found that there were serious uncertainties about how the Embankment might be reused, RGA produced a detailed "Area of Potential Effects Report and Proposed Methodology for Section 106 Consultation" in September 2008 ("APE Report"), which focused on the possibilities (1) that the Embankment might be acquired by the City and converted to a public park or (2) that the LLCs might obtain the local approvals required—including approval from the Jersey City Historic Preservation Commission—to develop the properties for residential housing.

Conrail did not, and does not, believe or concede that either these or the myriad other uses that have been proposed for the Embankment would be "reasonably foreseeable" or proximately "caused" by the Board's abandonment authorization. Nevertheless, for purposes of historic preservation review, Conrail in October 2008 provided the APE Report to the New Jersey State Historic Preservation Officer ("SHPO") and to SEA and conducted a site visit with them and representatives from RGA to view the Embankment and the surrounding area. By letter dated December 23, 2008, the SHPO concurred with the definition of the Area of Potential Effects in the APE Report.

Conrail first filed abandonment Notices of Exemption—including a Supplemental Environmental and Historic Report ("Supp. E&H Report") that incorporated the APE Report—on January 6, 2009. In order to provide time for the Board to address historic preservation issues before the Notices of Exemption became effective, Conrail contemporaneously filed a motion to stay the effective date of the Notices for 180 days and to waive certain pre-filing notification requirements. The City Parties opposed Conrail's motion, and in a decision served January 26,

2009, the Board rejected Conrail's motion and dismissed the Notices of Exemption without prejudice to Conrail's refiling under the Board's normal exemption procedures set forth in 49 C.F.R. § 1152.50. On February 26, 2009, Conrail refiled the Notices of Exemption under the normal procedures.

The City Parties were still not content. On March 12, 2009, they filed a pleading with the Board arguing, among other things, (1) that Conrail should not be permitted to seek abandonment authority because Conrail had allegedly engaged in "anticipatory demolition" of the Harsimus Branch in violation of Section 110(k) of the National Historic Preservation Act ("NHPA") and (2) that the Board should require the preparation of an Environmental Impact Statement ("EIS"), rather than following its normal procedure of preparing an EA and, if historic properties are involved, conditioning its abandonment authorization on completion of the historic review ("Section 106") process. Conrail replied to the City Parties' pleading on March 18, 2009.

On March 23, 2009, SEA issued its EA. With respect to historic preservation, SEA recommended conditioning the Board's abandonment authorization on a "comprehensive" Section 106 historic review that will provide "ample opportunity for public participation by all interested parties." EA at 4, 13-15. With respect the other environmental issues that had been raised, SEA found that those issues related to possible impacts of reuse of the Embankment properties that were beyond the scope of the Board's environmental review. Moreover, all of the potential reuse proposals would be subject to separate permitting processes before they could be implemented. Id. at 4, 7-9. Further, any impacts of construction would be temporary, and subject to the same controls under local ordinances of any other urban construction activity. Id. at 9-10, 12-13. For all these reasons, SEA determined that there was no reason to prepare an EIS. Id. at 4, 8, 16. SEA also determined that the City Parties had failed to demonstrate any

intent on Conrail's part to harm historic sites or structures in violation of Section 110(k) of the NHPA. Id. at 14.

On March 30, 2009, the Embankment Preservation Coalition requested a 30-day extension of time, to May 7, of the deadline for comments on the EA, which the Office of Proceedings granted in its decision served April 6. Since that time, SEA has received hundreds of largely duplicative letters from members of the Coalition and others—all requesting that the Board order the preparation of an EIS. On April 9, the City and the Rails to Trails Conservancy also filed lengthy "Initial Comments on Environmental Assessment,"[1] in which the City argued that the "controversy" surrounding this proceeding and the historic importance of the Embankment supported preparation of an EIS, and that SEA's reasons for concluding that an EIS was not required were wrong. Further, the City took issue with SEA's determination that Conrail had not engaged in "anticipatory demolition" in violation of Section 110(k) of the NHPA, and the City asserted that SEA incorrectly assumed that the Board's imposition of an historic preservation condition on its abandonment approval would prevent the LLCs from demolishing the Embankment while the condition was in place.

We address each of these arguments in our comments on the EA below.

Comments on Environmental Assessment

1. **Comments on EIS Determination.** SEA based its recommendation that preparation of an EIS is not justified in these proceedings on several grounds. Any of these

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[1] The City combined its "Initial Comments" with a "Motion for Reconsideration" of the April 6 decision of the Office of Proceedings rejecting the claim of the Embankment Coalition that Conrail had violated the newspaper notice requirements of 49 C.F.R. § 1105.12. Conrail replied to the City's Motion for Reconsideration by separate pleading filed with the Board on April 28, 2009.

grounds standing alone would have justified SEA's recommendation, but in combination they establish an unassailable legal and factual basis for its recommendation.

First, SEA observed that the Board's environmental rules provide for the Board generally to prepare an EA, rather than an EIS, in an abandonment proceeding. EA at 4 (citing 49 C.F.R. § 1105.6(b)(2)). This is consistent not only with the Board's regulations but also with the regulations of the Council on Environmental Quality ("CEQ"), which "encourage preparation of an Environmental Assessment where possible." *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 483 (2d Cir. 1988) (citing 40 C.F.R. § 1507.3(b)(2); 40 C.F.R. § 1500.4(p), (q), which require agencies to identify actions that do not require full EIS; and 40 C.F.R. § 1500.5(k), (l), which direct agencies to use categorical exclusions and findings of no significant impact to reduce delays when appropriate).

Second, SEA emphasized that "the historic preservation condition that SEA is recommending will ensure that the Board meets its obligations under NHPA." EA at 4. After describing the significant historic preservation work that had already taken place, SEA stressed that "the historic review process is just beginning." EA at 13. The APE Report and Proposed Methodology for Section 106 Consultation that Conrail submitted provides for a thorough public participation process—including preparation of a draft Cultural Resources Investigation report to be circulated for review and comment to all interested parties before a final report is prepared, and a public forum to provide additional opportunities for parties to provide their views. Additionally, Conrail will work with the STB, the SHPO, the City, the Embankment Coalition, and other consulting parties with the intention of arriving at a Memorandum of Agreement to address historic preservation effects.

The City suggests in its Initial Comments that SEA's provision for a "comprehensive historic review" under Section 106 (EA at 4) is not enough. The City asserts that "NEPA requires federal agencies to preserve important historic and cultural aspects of our nation's heritage." City Initial Comments at 7. From that premise, the City jumps to the conclusion that SEA cannot determine whether an EIS is required without first completing the Section 106 process and seeing if there is an adverse effect. If there is, then SEA must order preparation of an EIS at that point. Id. at 8. Other parties seeking preparation of an EIS on historic preservation grounds do not take such an extreme position. They simply argue that an EIS should be prepared to make sure that all parties' historic preservation concerns are heard.[2]

None of these arguments has any merit. In the first place, contrary to the City's suggestion that NEPA requires the preservation of historic properties, neither NEPA nor the NHPA mandates any particular result from the Board's or any other federal agency's historic review process. See, e.g., *Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 756-57 (2004) ("NEPA imposes only procedural requirements on federal agencies"); *Robertson v. Chief of Forest Service,* 490 U.S. 332, 350-51 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action"); *Illinois Commerce Comm'n v. ICC,* 848 F.2d 1246, 1260-61 (D.C. Cir. 1988) ("Like section 102 of NEPA, section 106 of [the NHPA] is a 'stop, look, and listen' provision; it requires federal agencies to take into account the effect of their actions on structures eligible for inclusion in the National Register of Historic Places."); *Connecticut Trust for Historic Preservation v. ICC,* 841 F.2d 479, 483 (2d Cir. 1988) ("NEPA and NHPA require only

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[2] See, e.g., Letter to SEA from Sameer dated April 5, 2009 (#EI-16826); Letter to SEA from Bradley Stonberg dated April 6, 2009 (#EI-16915); Letter to SEA from Roseann Mazzeo dated April 6, 2009 (#EI-16964).

that agencies acquire information before acting."); *Waterford Citizens' Ass'n v. Reilly,* 970 F.2d 1287, 1290 (4th Cir. 1992) (in imposing the "general obligations" of the NHPA, "Congress did not create a primary role for federal agencies to protect historic sites.)

Thus, the City is wrong when it suggests that the Section 106 process must result in the preservation of the Embankment parcels. All that NEPA and the NHPA require is that the STB be fully informed about the possible effects of its actions on historic properties.

The City is also wrong when it suggests that the possibility of a significant "adverse impact" on a historic property under Section 106 requires the preparation of an EIS under NEPA. The NHPA regulations expressly state that "[a] finding of adverse effect on a historic property does not necessarily require an EIS under NEPA." 36 C.F.R. § 800.8(a). The statute has a provision to the same effect: "Nothing in this subchapter shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under [NEPA]." 16 U.S.C. § 470h-2(i). See also *Consolidated Rail Corp.—Abandonment Exemption—In Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (served Aug. 10, 2006), slip op. at 3 (EIS process not required to address historic preservation concerns where approval of abandonment was conditioned on completion of Section 106 process).

Further, the City's suggestion that the Section 106 process must be completed before a determination can be made about whether an EIS is required is a prescription for regulatory gridlock and pointlessly repetitive procedures. It is frequently the case in abandonment proceedings that bridges and even entire railroad lines may be considered eligible for inclusion on the National Register of Historic Places. See, e.g., *Puget Sound & Pacific R.R. Co.—Abandonment Exemption—In Grays Harbor, WA*, STB Docket No. AB-1023 (Sub-No. 1X),

2009 WL 824738, *5 (served March 30, 2009); *Norfolk Southern Ry. Co.—Abandonment Exemption—In Fulton County, GA*, STB Docket No. AB-290 (Sub-No. 210X), 2008 WL 5366020 (served Dec. 24, 2008). The likelihood of "adverse impact" to those structures from their salvaging by the railroad is what triggers the need for a Section 106 process under the NHPA. The STB routinely in those cases prepares an EA regarding non-historical environmental issues, but conditions its abandonment approval on completion of the Section 106 process. Id.

The mitigation to which the consulting parties agree in the Section 106 process often permits the salvaging of the historic bridges or rail lines, so long as documentation is provided and educational materials are maintained to preserve the historic record of the bridges or lines. See, e.g., *Consolidated Rail Corp.—Abandonment Exemption—In Lancaster and Chester Counties, PA*, STB Docket No. AB-167 (Sub-No 1095X), 2005 WL 103214, *3 (served Jan. 19, 2005). That is consistent with the Board's (and the ICC's) established position that it may not appropriate an historic property for public use by prohibiting the railroad from disposing of property that is no longer needed for freight rail purposes. See, e.g., *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 829, 1991 WL 152985, *14 (1991); *Housatonic R.R. Co., Inc.—Operation Exemption,* Finance Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (served April 29, 1994); *Union Pacific R.R. Co.—Abandonment and Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA,* STB Docket No. AB-33 (Sub No.-265X), 2008 WL 1968727 (served May 7, 2008).

If parties could claim at the end of the Section 106 process that the "adverse impact" on the bridges or lines to be salvaged required the preparation of an EIS, the entire Section 106 process would be pointless. For all intents and purposes, the historic preservation review would

be repeated in the guise of an EIS proceeding rather than a Section 106 proceeding—to no purpose, since the end result would be the same.

NEPA does not require such pointless action. As the Supreme Court has emphasized:

> [I]nherent in NEPA and its implementing regulations is a "'rule of reason,'" which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any potential information to the decisionmaking process. See *Marsh [v. Oregon Natural Resources Council,]* 490 U.S. [360] at 373-374 [(1989)]. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS. See *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 325 (1975); see also 40 D.F.R. §§ 1500.1(b)-(c) (2003). [*DOT v. Public Citizen*, 541 U.S. 768, 767-768 (2004).]

Where the STB has provided for a comprehensive Section 106 proceeding, with multiple opportunities for public participation, "no rule of reason worthy of that title" would require the STB to conduct an EIS proceeding covering exactly the same ground. Thus, the City's suggestion that the Board could or should conduct an entire Section 106 proceeding to determine whether to conduct an EIS proceeding must be rejected.

By the same token, the concerns of the many parties who have written the Board requesting that it conduct an EIS proceeding so that historic preservation issues are fully aired are unfounded. SEA could not have made clearer in the EA that it intends to conduct a robust Section 106 process with every opportunity for all parties with any interest in historic preservation matters involving the Harsimus Branch to makes their views known both orally and in writing. No EIS proceeding could possibly be required on historic preservation grounds in light of the thorough airing of historic preservation issues that will take place in the Section 106 process.

Third, with respect to environmental issues, SEA noted in the EA that "case law and Board precedent clearly establish that the Board's NEPA review of a proposed abandonment properly is focused on the potential environmental impacts resulting from diversion of traffic from rail to other modes and salvage of the rail line." EA at 7 (citing *Iowa Southern R.R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496 (1989), aff'd sub nom. *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990)). Because no local or overhead traffic has moved over the line for many years and all track and track structure has already been salvaged, SEA correctly determined that "there is no potential for significant environmental effects related to diversion of traffic and salvage activities that would result from the proposed abandonment." Id. at 8. Accordingly, "an EIS is unnecessary here." Id.

SEA did not stop there, however. Observing that most of the environmental concerns that had been raised by parties to the proceeding "relate to the potential demolition and reuse of the Harsimus Embankment," id. at 4, SEA explained that "[o]rdinarily, the Board does not attempt to identify and address the environmental impacts of reuse alternatives of an abandoned right-of-way," id. at 8. This is a principle that the agency adopted in a rulemaking proceeding, and it is grounded both on the limits of the STB's control and the permitting authority of other agencies. See *Implementation of Environmental Laws,* 7 I.C.C.2d 807, 811-812 (1991) ("We are not a planning agency; the identification and development of reuse alternatives is the responsibility of state and local planning agencies, not the ICC."). See also, e.g., *New Jersey Dep't of Environmental Protection v. United States Nuclear Regulatory Comm'n,* 561 F.3d 132, 139 (3rd Cir. 2009) ("The Supreme Court has directed [for NEPA] purposes that we 'draw a manageable link between those causal changes that may make an actor responsible for an effect and those that do not.' [citing *Public Citizen*, 541 U.S. at 767]. In the cases, this line appears to

approximate the limits of an agency's area of control."); *Concord Township v. United States*, 625 F.2d 1068, 1074 (3d Cir. 1980) (ICC not required to address environmental effects of aspects of rail construction it approved, where permits would have to be obtained from other agencies for those aspects).

Moreover, SEA observed that in this case there is an additional reason why it would be improper for it to evaluate the environmental impacts of "reuse." That is that "it is unknown what ultimately will happen to the eight parcels that Conrail sold to [the LLCs]." EA at 8. As SEA explained, the City has indicated that it intends to condemn the properties for park and trail use.[3] The LLCs have submitted a number of proposals to the City that would permit the parcels to be developed for park, trail, and other purposes; however, these proposals are not based on current zoning requirements and would require the agreement of the City and other agencies in order to be implemented. The LLCs have applied for permits that would permit residential development on the Embankment, but because the Embankment parcels have been designated as an "historic landmark" under local law, the LLCs could not proceed with any development that would involve significant demolition of the Embankment without the prior approval of the Jersey City Historic Preservation Commission. Id. at 8-9. Indeed, "[a]ll of the possible reuse alternatives would require significant local government approvals prior to their implementation." Id. at 9. Thus, not only is it not reasonably foreseeable what will occur on the Embankment properties, but there is no reasonable nexus between the action before the Board—abandonment

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[3] Mayor Healy has also asserted a desire to acquire the Embankment properties for light rail use. See Verified Statement of Honorable Jerramiah Healy, attached to City Reply filed April 21, 2009.

approval for the Harsimus Branch right-of-way—and whatever subsequent reuse may be approved by local government authorities.

The City responds to SEA's reasoning by claiming, first, that SEA was wrong to determine that Conrail's "salvage" operations on the right-of-way were over. The City claims that Conrail's sale to the LLCs was a "de facto salvage arrangement," and "[t]he fact that Conrail contracted with a developer to handle removal no more takes this out of STB jurisdiction than if Conrail contracted with a salvager to remove a large bridge painted with lead paint over a major river." City Initial Comments at 10. The short answer to this argument is that Conrail had and has no desire to "salvage" the Embankments. Conrail sold the Embankment parcels by quit claim deeds with no conditions whatsoever placed on the LLCs' use of the parcels. How the LLCs or whoever else may acquire the parcels uses them, with or without the earth and stone structures, is up to them and the local government authorities who must approve their plans.

The City does not dispute that the Board and the ICC before it have consistently taken the position that "reuse" by third parties of property to be abandoned is beyond the scope of the agency's environmental review. EA at 4, 8. Nor does the City suggest that it is incumbent on the Board to examine every possible reuse alternative. Instead, the City spends pages arguing, with no substantiation, that "for purposes of analyzing the environmental consequences of abandonment, the point is that SLH is Conrail's designated salvage company." City Initial Comments at 16. No matter how many times the City's counsel repeats the same false claim, however, it is still false. Conrail did not hire the LLCs to demolish the Embankment structures. Conrail put the parcels out to bid "as is, where is," and the LLCs purchased them on that basis.[4]

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[4] It bears emphasizing that Conrail sold the Embankment parcels to the LLCs only after years of working with the City to sell those parcels to the Jersey City Redevelopment Agency. *City of*

Nor does the City provide a cogent argument that demolition of the Embankment is inevitable. Although the City spends pages denigrating the proposals that the LLCs have made to resolve their permitting issues amicably, the City does not deny that several proposals have been made or that the City intends to use eminent domain to acquire the properties "if all else fails." City Initial Comments at 15. Indeed, the City invites SEA to delve into the City's state-law claim that the City can void the deeds to the LLCs, id. at 29, as well as into the standards that the Jersey City Historic Preservation Commission will use to decide whether to approve one or more of the proposals the LLCs have made for redevelopment of the Embankment parcels, id. at 17. All of this only reinforces SEA's point that for NEPA purposes there is no reasonable foreseeability about reuse of the properties, and no reasonable nexus between the Board's abandonment approval and whatever uses may be made of the properties by third parties after they clear the determinative local permitting hurdles.

Most parties asking the STB to require the preparation of an EIS on environmental grounds other than historic preservation do not bother to address SEA's analysis at all. They simply assert that the STB should require the preparation of an EIS so that the Board's analysis of those issues will be thorough.[5] But this puts the rabbit in the hat. The Board is not authorized to evaluate environmental effects that are outside of its control. The Supreme Court has emphasized that "NEPA requires 'a reasonably close causal relationship' between the

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Jersey City, slip op. at 5; Verified Statement of Robert W. Ryan ("Ryan VS") filed April 24, 2006, in Docket No. 34818, at 14. When Conrail finally put the line out to bid, it included the Redevelopment Agency on the bidder list. Ryan VS at 15, Exh. W. It also included the head of the Embankment Coalition on the list. Ryan VS, Exh. W. The City was alerted to the bidding process. Ryan VS at 15, Exh. T. None of them submitted a bid.

[5] See, e.g., Letter to SEA from Jonathan Stead dated March 31, 2009 (#EI-16613); Letter to SEA from Rich Mendez dated April 2, 2009 (#EI-16671); Letter to SEA from Mehves Ozagar dated April 2, 2009 (#EI-16681).

environmental effect and the alleged cause. The Court analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 756, 767 (2004) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774 (1983)). In *People Against Nuclear Energy*, the Court explained that "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within § 102 [of NEPA] because the causal chain is too attenuated." 460 U.S. at 774. The agency is not required to treat a third party's actions as an "effect" of the agency's action. *Public Citizen,* 541 U.S. at 770. This is particularly so when the third party is another government agency. As the Fifth Circuit has observed, "it is doubtful that an environmental effect may be considered as proximately caused by the action of a particular federal regulator if that effect is directly caused by the action of another government entity over which the regulator has no control." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005).

Nor can parties avoid the constraints of NEPA law by claiming that this is a "controversial" case. That a lot of people may be concerned about an agency's undertaking does not make it "highly controversial" within the meaning of the regulations of the Council on Environmental Quality ("CEQ"), 40 C.F.R. § 1508.27 (setting forth factors for agencies to consider in determining whether the preparation of an EIS is necessary or desirable). "'[C]ontroversial' is usually taken to mean more than some public opposition to a particular use—rather it requires 'a substantial dispute . . . as to the size, nature, or effect of the major federal action.'" *Coliseum Square Ass'n, Inc. v. Jackson,* 465 F.3d 215, 234 (5th Cir. 2006) (citing *Center for Biological Diversity v. U.S. Fish & Wildlife Service,* 202 F.Supp.2d 594, 657-58 (W.D. Tex. 2002)). *See also River Road Alliance, Inc. v. Corps of Engineers of U.S. Army,*

764 F.2d 445, 451 (7th Cir. 1985) ("The fact that there was public opposition to the fleeting facility cannot tip the balance [toward requiring preparation of an EIS]. See, e.g., *Town of Orangetown v. Gorsuch,* 718 F.2d 29, 39 (2d Cir. 1983). That would be the environmental counterpart to the 'heckler's veto' of First Amendment law.")

From any objective legal or factual standpoint, there is no substantial dispute in this case about the STB's exercise of its abandonment authority. All of the environmental opposition is grounded on what third parties—in particular the City and the LLCs—may or may not use the property for after Conrail has abandoned the right-of-way. The agency has authoritatively held by rule that such "reuse" issues are beyond the scope of the agency's environmental review. Furthermore, there is no reasonable foreseeability or causal connection between the Board's action and the ultimate use to which the property is put. In short, the "controversy" in this case provides no legal basis for requiring preparation of an EIS.

Fourth, although stressing that the environment effects of reuse was beyond the Board's regulatory purview, EA at 9, SEA nevertheless summarized and responded to the comments it had received on the environmental resource areas typically discussed in its EAs for rail abandonment cases, EA at 9-13. SEA concluded that, even assuming demolition of the Embankment parcels would result from abandonment of the Harsimus Branch, the effects of the demolition would be temporary, and they would be subject to the same controls under local ordinances as any other urban construction activity. Id.[6]

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[6] *See Chelsea Property Owners—Abandonment—Portion of the Consol. Rail Corp. W. 30th St. Secondary Track in New York, NY,* 8 I.C.C.2d 773, 793 and n. 24 (1992) (because effects of demolishing elevated line, including through buildings, would be temporary and governed by local safety and noise ordinances, preparation of EIS was not warranted, and finding of no significant impact was justified).

The City first complains that SEA did not address environmental effect on the Harsimus Branch right-of-way outside of the Embankment parcels. City Initial Comments at 6-7. But ***no one*** has ever claimed there would be any impacts other than on the Embankment parcels.[7]

With respect to the Embankment, the City complains that it is "unaware of what permit requirements would abate the noise, dust, and vibration impacts flowing from removal of the huge earthen fill structures here." City Initial Comments at 18. Conrail specified in its Supp. E&H Report (at 7-8) exactly what state permit requirements would govern dust control under the NJDEP's regulations, and the Jersey City Municipal Code is replete with regulatory constraints on noise, dust, and vibration.[8]

More generally, it bears emphasizing the NJDEP extensively regulates not only dust control but every other aspect of site remediation and disposal of contaminated materials in connection with construction projects. As detailed in Conrail's Supp. E&H Report (at 8):

> NJDEP permits historic fill to be excavated and disposed of, or to be left in place with appropriate engineering and institutional controls, in accordance with NJDEP's Technical Requirements for Site Remediation, N.J.A.C. 7:26E. As with the excavation of any contaminated material, the work is performed by licensed professionals under the oversight of NJDEP and in accordance with a Health and Safety Plan. A Health and Safety Plan (N.J.A.C. 7:26E-1.9) governs the proper handling and safety procedures, including dust control and, where deemed appropriate by NJDEP, air monitoring to ensure that acceptable air quality is maintained during the course of work. Disposal of material is also overseen

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[7] As SEA correctly summarized, the line east of Marin Boulevard was long ago sold for development, and no trace of it remains. And Conrail has no present plans for the small portion of property it continues to own between Waldo Avenue and Newark Avenue. EA at 8.

[8] The City also complains that local regulation is inadequate to deal with traffic impacts of a construction project if local infrastructure is inadequate. City Initial Comments at 19. But that is simply not credible in an area that over the past 30 years has been transformed by the construction of multiple high-rise condominiums, hotels, and office buildings.

by NJDEP pursuant to New Jersey's solid waste law and its technical regulations.

Thus, if and when the City, the LLPs, or any other acquirer of the Embankment parcels is permitted by state and local law to demolish any part of the Embankment structures involving contaminated material, that demolition will be fully and independently regulated by NJDEP. SEA properly determined that the STB has no need or authority to attempt to place its own demolition conditions on third-party reuse of those properties.[9]

2. Comments on Section 110(k) Determination. SEA thoroughly analyzed the claim made by the City, the SHPO, and others that Conrail had violated Section 110(k) of the NHPA. At bottom, SEA determined that their claim failed because "the parties making this argument have not demonstrated any intent on Conrail's part to harm historic sites or structures." EA at 14. SEA correctly read both the letter and the spirit of the law. Section 106 states clearly that it applies only to "an applicant who, ***with intent to avoid the requirements of [Section 106]***, has ***intentionally*** significantly adversely affected a historic property." 16 U.S.C. § 470h-2(k)

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9 One party suggested that the Board should conduct an EIS because it is possible that it would find endangered species on the Embankment parcels. Reply to Environmental Assessment, filed March 31, 2009, by NY/NJ Baykeeper. However, Conrail confirmed through correspondence and conversations with the U.S. Fish and Wildlife Service that the Service had identified no endangered species in the area. Supp. E&H Report at 9; EA at 11. Under Section 7(a)(2) of the Endangered Species Act and its implementing regulations, the Fish and Wildlife Service is responsible for these determinations. See *Environmental Coalition of Ojai v. Brown*, 72 F.3d 1411, 1416-17 (9th Cir. 1995) (Government properly relied on Fish and Wildlife Service determination regarding endangered species in project area). The implementing regulations specifically provide: "If during informal consultation it is determined by the Federal agency, with the written concurrence of the [Fish and Wildlife] Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and *no further action is necessary*." 50 C.F.R. § 402.13(a) (emphasis added).

The mere "possibility" that endangered species could be found obviously cannot provide a basis for more extensive environmental review. After all, anything is "possible." If that were the standard for requiring the preparation of an EIS, virtually all abandonments of railroad rights-of-way would require the preparation of an EIS.

(emphasis added). In short, the agency must find specific intent to demolish property in order to avoid the NHPA historic review process.[10]

Neither the City nor anyone else has pointed to any credible evidence that Conrail has taken any action to avoid the Section 106 process. On the contrary, as SEA pointed out in the EA, after the Board determined that abandonment authority was required for the portion of the Harsimus Branch including the Embankment, Conrail hired an environmental consultant to prepare a detailed APE Report, consulted with the SHPO and SEA, and supported the historic review process. EA at 14. Prior to that time, the only demolition that Conrail or anyone else had performed on the Embankment had taken place in the 1990s, at the City's urging and long before anyone had suggested that abandonment authority might be required for the line.[11]

The City is reduced to arguing in its Initial Comments that Conrail somehow engaged in "anticipatory demolition" within the meaning of Section 110(k) by selling the Embankment properties without seeking abandonment authorization. But there is no credible evidence that

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[10] This is exactly how the courts have read the statute. *See, e.g., Committee to Save Cleveland's Hewletts v. U.S. Army Corps of Engineers*, 163 F.Supp.2d 776, 793 (N.D. Ohio 2001) (Section 110(k) "works to punish those who would seek to manipulate the Sec. 106 process by denying them access to post-demolition permits"); *Young v. General Services Admin.*, 99 F.Supp.2d 59, 82 (D.D.C. 2000) (Agency's job under Section 110(k) to determine if the applicant "intended to avoid the requirements of Section 106"). Nowhere has the City or any other party offered any authority to the contrary.

[11] The City claims in its "Initial Comments" that what happened in the 1980s or 1990s is "irrelevant," since allegedly "City and RTC are not protesting anticipatory demolition of bridges or rail at that time." Initial Comments at 22. This represents a reversal of the City's prior position that Conrail should be faulted for "anticipatory demolition" because it intentionally "took out all track and ties, and removed the bridges." City Letter to SEA dated March 28, 2008, at 13. It leaves the City claiming that Conrail engaged in "anticipatory demolition" after 2000 not because it demolished anything, but because Conrail sold the Embankment properties without seeking abandonment authority from the STB. As discussed above, there is no evidence that Conrail had any belief that abandonment authority was required, much less that Conrail sold the property in order to avoid the Section 106 process.

Conrail had any belief that Board approval was required for Conrail to dispose of the property.[12] Absent a requirement for Board approval for abandonment, which could constitute an "undertaking" triggering the Section 106 process, there was no reason for Conrail to be concerned about that process. 16 U.S.C. § 470w(7). It was not until after the sale closed in July 2005 that anyone suggested that Board approval might be required.[13] Thus, there is no basis for any finding by the Board that Conrail had any belief that Section 106 applied at all to disposition of the Embankment properties, much less that Conrail acted with specific intent to avoid the requirements of Section 106.

3. Comments on Section 106 Review Condition. SEA in the EA recommended that the Board impose a Section 106 historic preservation condition under which Conrail "shall retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the [NHPA] has been completed." EA at 15. The City in its

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[12] The City repeats a suggestion it has made in the past—that Conrail representatives asserted orally that the City's exercise of eminent domain was preempted, implying that the Embankment properties were regulated by the Board. City Initial Comments at 24-25. Those Conrail representatives have filed verified statements denying that they made any statement to that effect, and demonstrating that the City's suggestion to the contrary (which is unsupported by any writing) is not in the least bit credible. *See* Ryan VS at 17 and Fiorilla VS at 2-4, attached to Reply Statement of Consolidated Rail Corporation, filed April 24, 2006, in STB Finance Docket No. 34818.

[13] Conrail did recognize that the fact that the Embankment properties were declared an "historic landmark" by the City in 2003 could affect the ability of any developer that acquired the properties to develop them. Accordingly, Conrail advised all of the parties on the list of prospective bidders that development of the properties would be contingent on their compliance with the City's Historic Preservation laws. *See* Ryan VS at 15-16 and Exh. U. Thus, there was no effort by Conrail to avoid any historic preservation law that it believed was applicable to the Embankment properties.

Initial Comments suggests that SEA incorrectly assumes that this will protect the Embankment properties from demolition during the Section 106 process. Because the order applies to Conrail but not to the LLCs, and because the LLCs are seeking approval from the Jersey City Historic Preservation Commission for development of the Embankment properties, the City argues that SEA needs to explain "how SEA's proposed section 106 condition bars SLH from tearing out the Embankment while SEA, SHPO, and consulting parties engage in the section 106 process." City Initial Comments at 29.

The City is beating a dead horse. When the Board's declaratory order proceeding began in Docket No. 34818 in January 2006, both Conrail and SLH committed to the Board that the LLCs would not alter the remaining structures on the Harsimus Branch, and they have not done so. *City of Jersey City* (decision served January 24, 2006), slip op. at 2. After Conrail delayed filing Notices of Exemption in April 2008, because of the concerns the City and others had expressed about historic preservation issues, the City complained that Conrail appeared to be avoiding the abandonment process in order to enable the LLCs to obtain local permits that would enable them to demolish the Embankment properties. City Letter to Quinlan, SEA, and Clemens, filed April 25, 2008, in Docket No. AB 167 (Sub-No. 1189X). Conrail answered that with a letter explaining that all of the local permitting processes were contingent on Conrail obtaining the necessary federal abandonment authority. Conrail Letter to Quinlan, SEA, and Clemens, filed April 28, 2008, in Docket No. AB 167 (Sub-No. 1189X).

Even more recently, in response to the City's assertions that the Board should order "reconveyance" of the Embankment properties to Conrail in order to protect the STB's jurisdiction, Conrail explained again that this was simply untrue. Conrail emphasized that the LLCs had committed not to demolish any Embankment properties until such time as the Board

has finalized abandonment proceedings, including satisfaction of Section 106 conditions. Conrail's Reply to City Parties' "Restatement of Previously Requested Relief and Reservation of Rights," at 10, filed March 18, 2009. Conrail also noted that the LLCs had authorized Conrail to represent that they are prepared to participate as consulting parties in the Section 106 process. Id. at 11.

All of this was known to SEA when it issued its EA. Thus, SEA correctly assumed, contrary to the City's repeated (and repeatedly refuted) contentions, that a Section 106 condition would be honored by Conrail and the LLCs alike.[14]

Conclusion

SEA correctly concluded in the EA (1) that there was not need or justification for preparing an EIS in these proceedings, (2) that the evidence did not support the claim of some parties that Conrail had engage in "anticipatory demolition" in violation of Section 110(k) of the NHPA, and (3) that the imposition of an historic review condition would prevent any alteration of the Embankment parcels pending completion of the Section 106 process.

Respectfully submitted,

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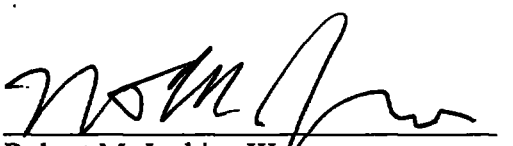
[14] At bottom, it appears that the City's contentions about protecting the 106 process are simply another excuse to argue that the Board should order reconveyance of the Embankment properties to Conrail. We have addressed every aspect of this contention before and need not repeat that discussion again here. See Conrail's Reply to City Parties "Restatement of Previously Requested Relief and Reservation of Rights," filed March 18, 2009, at 7-11.



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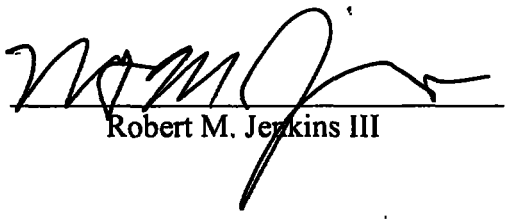
Dated: May 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2009, I caused a copy of the foregoing "Comments of Consolidated Rail Corporation on Environmental Assessment" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List.



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